

No. 10021

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

*Appellant,*

*vs.*

L. BOTELER, Trustee in Bankruptcy of the Estate of  
DAVIS STANDARD BREAD COMPANY, a corporation,

*Appellee.*

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APPELLANT'S OPENING BRIEF.

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## APPELLANT'S OPENING BRIEF.

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### Statement of Jurisdictional Facts.

Davis Standard Bread Company, a corporation, filed a debtor's petition under Chapter X of the National Bankruptcy Act with the District Court of the United States, Southern District of California, Central Division, on or about the 5th day of August, 1940. [See Tr. of Record pp. 2-23.]

Davis Standard Bread Company, a corporation, was adjudicated a bankrupt, and a Trustee in Bankruptcy was appointed on or about the 14th day of August, 1941, by

the United States District Court, Southern District of California, Central Division. [See Tr. of Record pp. 24-30.]

Trustee in Bankruptcy, L. Boteler, filed with Benno M. Brink, Referee in Bankruptcy, on the 9th day of October, 1941, a Petition for a Restraining Order asking that the Referee restrain the State Board of Equalization of the State of California from attempting to collect the California Retail Sales Tax from the Trustee in Bankruptcy upon sales made by the Trustee of the assets of the bankrupt estate. [See Tr. of Record pp. 31-34.]

After a hearing duly and regularly had before the Referee in Bankruptcy, the facts not being in dispute, the Referee in Bankruptcy, Benno M. Brink, did on the 19th day of September, 1941, issue a Restraining Order against the State Board of Equalization enjoining and restraining the State Board of Equalization from attempting to collect any sales tax on any items of the bankrupt estate sold to purchasers in connection with the liquidation thereof except such sales as had been made in the usual course of retail business and in the actual operation thereof. [See Tr. of Record pp. 36-38.]

On September 23, 1941, the State Board of Equalization filed with the United States District Court its Petition for Review of the Order of the Referee in Bankruptcy, together with its assignment of errors. [See Tr. of Record pp. 38-41.]

Thereupon the Record of Proceedings was regularly certified to the District Court by the Referee. [See Tr. of Record pp. 42-47.]

Thereafter the District Court made its Order confirming the Order of the Referee. (See Order of Benjamin Harrison, Judge, filed December 4, 1941.) [See Tr. of Record pp. 47-51.]

(See Order of Benjamin Harrison, Judge, filed December 12, 1941.) [See Tr. of Record pp. 52-55.]

Thereafter, and on the 9th day of January, 1942, the State Board of Equalization, by its attorney, Earl Warren, Attorney General of the State of California, filed its Notice of Appeal with the United States District Court, together with a Stipulation to the effect that the amount of the claim involved was in excess of \$500.00. [See Tr. of Record p. 55.]

### **Abstract of the Case.**

There is no issue of fact in the present case. The facts set forth in the petition for the restraining order were admitted. The facts recited by the Judge of the District Court in his order are true. [Tr. of Record p. 52.] The issue raised at all times was one of law alone. The question presented is whether or not a trustee in bankruptcy selling assets of the bankrupt estate is exempt from paying the California Retail Sales Tax by reason solely of the fact that he is a trustee in bankruptcy. In other words, whether or not sales which would otherwise be taxable as retail sales within the State of California are not taxable as retail sales because they are sold by the trustee in bankruptcy in the liquidation of a bankrupt estate.

### Assignment of Errors.

The appellant, State Board of Equalization of the State of California, by its attorneys, presents to the court its Assignment of Errors whereby said appellant assigns as error in the records and proceedings of the District Court of the United States, Southern District of California, Central Division, the following particulars and errors:

(1) That the Court erred in affirming the order of the Referee in Bankruptcy restraining the State Board of Equalization from asserting any claim for retail sales tax under the provisions of the California Retail Sales Tax Act by reason of certain sales made by him as Trustee in Bankruptcy of the above entitled bankrupt estate;

(2) That the Court erred in concluding that the sales made by L. Boteler as Trustee in Bankruptcy of certain assets belonging to the said bankrupt estate to purchasers at private sale for the purpose of liquidation were not retail sales within the meaning of the California Retail Sales Tax Act.



## ARGUMENT.

### I.

#### Piecemeal Selling of Tangible Personal Property Constitutes Doing Business as a Retailer in the State of California Within the Provisions of the California Retail Sales Tax Act.

Section 3 of the California Retail Sales Tax Act provides:

“For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of \* \* \* three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935; \* \* \*.”

A “retailer” is defined in Section 2(e) of said Act as follows:

“‘*Retailer*’ includes every person engaged in the business of making sales at retail \* \* \* of tangible personal property \* \* \*.”

A “retail sale” or “sale at retail” is defined in Section 2(c) of said Act as follows:

“A ‘*retail sale*’ or ‘*sale at retail*’ means a sale to a consumer or to any person for any purpose other than for resale in the regular course of business in the form of tangible personal property, \* \* \*.”

Section 17 of the Retail Sales Tax Act provides:

“\* \* \*

“*For the purpose of the proper administration of this act and to prevent evasion of the tax hereby im-*

*posed it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established. \* \* \*."*

"*Business*" is defined in Section 2(d) of said Act as follows:

"\* \* \* any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect."

From these definitions it is clear that the Trustee in Bankruptcy, in selling the machinery and miscellaneous assets of Davis Standard Bread Company, was engaged in the business of selling at retail for the benefit of the creditors of that company.

It is argued by the attorneys for the Trustee that because these sales are sales of the capital assets of the business rather than sales of the merchandise of the retail bakery business, they are sales of a casual and incidental nature and are not a part of the usual retail business of the bakery and are, therefore, not subject to the Retail Sales Tax Act. This proposition has been negatived by the Supreme Court of the State of California in the very recent case of *Carl M. Bigsby v. Charles G. Johnson, State Treasurer*, decided Oct. 28, 1941, and appearing at page 931 of the *Advanced California Reports*, 18 A. C. of No. 26, p. 931; 6 C. D. 212. This case, decided since the signing by the Referee of the restraining order herein directed to the State Board of Equalization, holds that the sale by a retailer of the capital assets of his business is a sale subject to the sales tax. The property sold in that case was a Monomelt pot and its accessories, which

constituted a capital asset in the nature of machinery and equipment and was no part of the merchandise ordinarily sold by Bigsby. The Supreme Court, after quoting the sections of the Act heretofore cited, said (p. 934):

“The question arises, therefore, whether the legislature intended to include in the measure of the tax the receipts from those retail sales of a retailer that are incidental and casual, as well as from the retail sales that are made in the ordinary course of business. Although most jurisdictions imposing sales taxes specifically exempt casual or isolated sales, a majority of them hold that the exemption does not include casual retail sales made in the course of business operations by one who is engaged in the retail sales business. (Prentice-Hall, *State & Local Tax Service*, pars. 92,572, 92,953.) The tax is imposed upon retailers for the privilege of doing a retail sales business (*Western Lithograph Co. v. State Board of Equalization*, 11 Cal. (2d) 156, 164 (78 Pac. (2d) 731, 117 A. L. R. 838)), and the measure of the tax is the gross receipts of any such retailer from the sale of ‘all tangible personal property sold at retail. . . .’ (Act 8493, sec. 3.) The plaintiff is a retailer. He sold the personal property in question at retail as a part of his business operations, and the plain language of the act requires the inclusion of the gross receipts therefrom in the measure of the tax. He can claim no exemption merely by virtue of the fact that the sale of used printing equipment was not the kind of retail sale ordinarily made by him. Our statute creates no exemption covering the situation, and however forceful may be plaintiff’s contention that this type of sale should be exempted from the operation of the statute, such arguments must be directed to the legislature rather than to the courts.”

The California Supreme Court in the case of *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. (2d) 156, 164, held that the retail sales tax is a tax imposed for the privilege of making sales at retail in the State of California. A sale at retail is any sale other than a sale for resale. This Trustee in Bankruptcy is engaged in making sales at retail for the benefit of the creditors of Davis Standard Bread Company, Bankrupt. He is therefore engaged in the business of selling at retail and is subject to the Sales Tax Act. The construction of a State statute placed thereon by a State court is binding upon the Federal courts. (*Erie Ry. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. Rep. 817; see also *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 58 S. Ct. 860, at 862.)

In the case of *Union League Club v. Johnson*, decided by the Supreme Court of California in July, 1941 (18 A. C. 257), the court upheld a sales tax upon liquor sold at a social club. The court there said (p. 260):

“It is significant that the statute does not include the word ‘profit’ in its definitions but imposed a tax upon the transactions of one conducting business ‘with the object of gain, benefit or advantage, either direct or indirect.’ Assuming that no profit was either intended or realized by the club from the operations of its dining rooms and bar, it does not follow that there was no ‘gain, benefit or advantage.’ Few persons would go to a club without these facilities and they undoubtedly largely contribute to the success of such an enterprise. In construing a statute using the identical language of our own, the Su-

preme Court of Iowa aptly remarked: “‘Profit’ may be said to be ‘gain, benefit, or advantage,’ but ‘gain, benefit, or advantage’ does not necessarily mean only ‘profit’.” (*State v. Zellner*, 133 Ohio St. 263 (13 N. E. (2d) 235).)”

Section 124-a, Title 28, of the United States Code annotated provides:

“Any receiver, liquidator, referee, trustee or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if said business were conducted by an individual or corporation: *Provided, however,* That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same. (June 18, 1934, c. 585, 48 Stat. 993.)”

In other words, the Trustee in Bankruptcy is liable for any State Tax imposed for the *conducting of any business*. This does not mean that he, as Trustee in Bankruptcy, must necessarily conduct the retail bakery business of the bankrupt in order to be subject to the tax in the instant case. If he is selling the machinery and equipment at retail, he is conducting a retail business within the mean-

ing of the Act, even though, as was said in the *Bigsby* case, *supra*, it is not the same kind of business for which the company was originally organized, and for which the said corporation originally obtained the permit. Suppose no bankruptcy had been had; suppose the officers of the company for the benefit of the creditors had sold out the assets of the business, there is no question but that under the *Bigsby* case those officers would have been liable for the tax. The mere fact that the Trustee in Bankruptcy is substituted in the place of the original managers of the business for the purpose of selling out the assets for the benefit of the creditors does not vary the rule.

An excellent case upon the construction of Section 124-a, Title 28, U. S. C. A., is *Boteler v. Ingels*, 308 U. S. 57, 521, 60 S. Ct. 29. In that case the United States Supreme Court emphatically reiterates that the State has the right to impose upon Trustees in Bankruptcy the same obligations for the same privileges that they impose upon private citizens. There is no doubt that if Mr. Boteler, acting for the corporation, were selling these assets, he would be liable under the Retail Sales Tax Act. The mere fact that he is acting under order of the Federal Court does not exempt him from this tax. (See also *Gillis v. State of California*, 293 U. S. 62, 55 S. Ct. 4, 79 L. Ed. 199.)

The payment of this tax is not a charge upon the estate. It is the duty of the Trustee in Bankruptcy to collect this tax from the purchasers and to pay it into the State Treasury. He performs this duty in return for the privilege of



selling to consumers and not for resale in the State of California. (Sec. 8½, Retail Sales Tax Act.) That section provides for such reimbursement. In the case of *De Aryan v. Akers*, 12 Cal. (2d) 781, at 785, the court said:

“The pertinent provisions of the act indicate that the legislature recognized the obvious economic necessity of the retailer’s recoupment of the tax from sales, and that some such method as that adopted by it for reimbursement was also necessary if the small and independent tradesman was to remain in business. It also distinctly indicated, however, that the provision for the method of reimbursement should not disturb the relationship of sovereign and taxpayer created between the state and the retailer. \* \* \* When properly understood, in connection with the other parts of the act, the provisions of sections 8½ and 9 here involved must be considered valid and enforceable.”

The legislature has not exempted sales made by Receivers and Trustees in Bankruptcy from the operation of this statute, as it could have done had it intended said sales to be exempt and as it has done in other statutes. (See Sec. 2-c-1 of the Corporate Securities Act, Deering’s General Laws, Act No. 3814, General Laws of California, Statutes of 1917, p. 673, as amended.)

It is respectfully submitted that the Trustee, having actually exercised the privilege of selling tangible personal property at retail in this State as a retailer, as defined in the statute here under consideration, and as construed in the *Bigsby* case, *supra*, should apply for and procure a per-

mit as provided by Section 12 of the Retail Sales Tax Act and report and pay to the State of California 3% of the gross receipts on all of his retail sales as hereinabove and in said Act defined, reimbursing himself and the estate therefor as provided for and permitted by Section 8½ of said Act.

This Court well knows that Trustees in Bankruptcy sell thousands of dollars worth of tangible personal property in California every year. The *primary* function of a Trustee in Bankruptcy is to sell the assets of the bankrupt estate. All of these sales are presumed to be at retail. (Retail Sales Tax Act, Sec. 17.) The tax is not a burden upon the estate since the Trustee has the duty of collecting it from the purchaser. Unless these Trustees are subject to the Retail Sales Tax Act they may come into their market with a 3% advantage over all other sellers in the State. This was not the purpose and intent of either the Retail Sales Tax Act or the Bankruptcy Act.

Respectfully submitted,

EARL WARREN,

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By ALBERTA BELFORD,

*Deputy Attorney General,*

*Attorneys for Appellant, State Board of Equalization of  
the State of California.*



# CALIFORNIA RETAIL SALES TAX ACT

AS IN EFFECT SEPTEMBER 13, 1941



PUBLISHED UNDER AUTHORITY OF  
STATE BOARD OF EQUALIZATION  
SACRAMENTO

GEORGE R. REILLY, San Francisco	First District
FRED E. STEWART, Oakland	Second District
R. E. COLLINS, CHAIRMAN, Redding	Third District
WILLIAM G. BONELLI, Los Angeles	Fourth District
HARRY B. RILEY, Long Beach	Controller

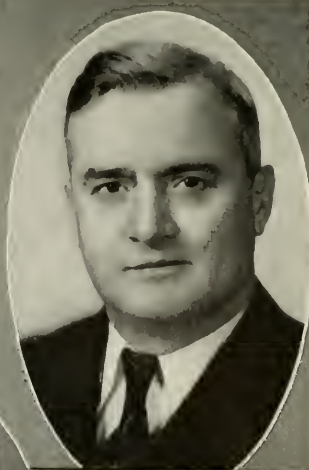
DIXWELL L. PIERCE  
*Secretary*



# CALIFORNIA STATE BOARD OF EQUALIZATION



GEORGE R. REILLY  
MEMBER, FIRST DISTRICT



FRED E. STEWART  
MEMBER, SECOND DISTRICT



RICHARD E. COLLINS  
MEMBER, THIRD DISTRICT  
CHAIRMAN



HARRY B. RILEY  
STATE CONTROLLER



WILLIAM G. BONELLI  
MEMBER, FOURTH DISTRICT



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## ANALYSIS OF ACT

(1) **Nature of the tax.** The tax is imposed upon retailers for the privilege of selling tangible personal property at retail.

(2) **Rate of tax.** The tax is imposed at the rate of 3 per cent of the gross receipts from retail sales of tangible personal property sold on and after July 1, 1935. The rate of the tax was  $2\frac{1}{2}$  per cent of the gross receipts from retail sales made from August 1, 1933, to and including June 30, 1935.

(3) **Who are taxable.** Any person, firm, partnership, corporation, etc., engaged in the business of selling tangible personal property at retail is subject to the tax.

Receipts from sales by manufacturers, jobbers and wholesalers are taxable when the sales are made in the course of their business to purchasers for use or consumption and not for resale.

The tax does not apply to the gross receipts from isolated or occasional sales of tangible personal property not sold or used in the course of business operations.

(4) **Nontaxable sales.** (a) **Sales of tangible personal property for the purpose of resale**, either in the form in which sold or when an ingredient or component part of other tangible personal property.

(b) **Sales of real property.**

(c) **Sales of intangible personal property**, such as book accounts, stocks, bonds, mortgages, notes and other evidences of debt.

(d) **Sales of theater tickets**, railroad, stage and admission tickets of all kinds.

(e) **Sales which California is prohibited from taxing** under the Federal or State Constitution.

(f) **Sales of gas, electricity and water** when delivered to consumers through mains, lines, or pipes.

(g) **Sales of gold bullion**, gold concentrates or gold precipitates by the producer or refiner thereof.

(h) **Sales of tangible personal property used for the performance of a contract on public works executed prior to August 1, 1933.**

(i) **Sales of food products for human consumption.** The term "food products" does not include candy, confectionery, spirituous, malt or vinous liquors, soft drinks, sodas or beverages such as are ordinarily dispensed at bars or soda fountains or in connection therewith, medicines, tonics, and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts, or meals served on or off the premises of the retailer or drinks or foods furnished, prepared or served for con-



sumption at tables, chairs or counters or from trays, glasses, dishes or other tableware provided by the retailer.

(j) **Sales to the United States** or any agency or instrumentality thereof except a corporate agency or a corporate instrumentality.

(k) **Sales of vessels** of more than 1,000 tons burden by the builders thereof.

(l) **Sales of silver bullion** by the producer or refiner thereof.

(m) **Sales of motor vehicle fuel** subject to the tax imposed by the "Motor Vehicle Fuel License Tax Act" and not subject to refund. If subject to refund, the sales tax is collected by deduction from the refund.

(n) **Sales of any publication** regularly issued at average intervals not exceeding one month and of tangible personal property which becomes an ingredient or component part of any such publication.

(o) **Sales of live stock and poultry** of a kind the products of which ordinarily constitute food for human consumption.

(5) **What is required of sellers.** (a) Every person, firm, partnership, corporation, etc., engaging in the business of selling tangible personal property, the gross receipts from the retail sale of which are required to be included in the measure of the sales tax, must apply to the State Board of Equalization for a permit on a form prescribed by the board. Wholesalers, as well as retailers, must secure such permit. The application must be accompanied by a fee of one dollar (\$1) for each permit.

(b) A separate permit must be secured for each place of business, must be conspicuously displayed at the place for which issued and is valid until suspended or revoked by the board.

(c) Quarterly returns must be filed with the board within 15 days after the end of each quarterly period, except that the board may require, in some cases, filing of returns for other than quarterly periods.

(d) Returns are to be made on forms prescribed by the board and must be accompanied by a remittance of the amount of tax due, payable to the State Board of Equalization.

(e) Failure to pay any tax or assessment within the time required by the act will result in the imposition of a 10 per cent penalty.

(f) If returns are not filed, an assessment of the amount of tax due will be made and a 10 per cent penalty added thereto.

(g) Sellers must maintain complete records of all their gross receipts.

(6) **Disposition of proceeds.** All collections are deposited in the State Treasury to the credit of the Retail Sales Tax Fund. After deductions for administrative expense and allowance of refunds for any erroneous collections and payments, the balance in such fund



is transferred to the General Fund to be expended for the support of the State Government and the public school system.

(7) **Relationship to use tax.** Attention of sellers of tangible personal property is directed to the Use Tax Act administered by the State Board of Equalization in conjunction with the Retail Sales Tax Act. Imposed at the same rate as the sales tax, namely 3 per cent of the sales price, the use tax applies to such amounts when tangible personal property is purchased from retailers for storage, use, or consumption in California, except when the gross receipts from the sale of the property are subject to the sales tax here or in those cases where an exemption is provided, as for food products and motor vehicle fuel. The principal application of the use tax is with respect to property purchased outside of California or in inter-state commerce for use here.

If retailers maintain places of business in California they are required to collect the use tax whenever they make sales of tangible personal property with respect to which that tax applies. Such transactions should be reported along with the sales tax and an appropriate space is provided for that purpose in the forms for return. Retailers who do not maintain places of business in California may be authorized to collect the use tax from their customers, after securing certificates of such authority, upon compliance with conditions prescribed by the State Board of Equalization. Whenever the use tax is not collected by the seller it must be paid directly to the board by the purchaser. Accordingly, retailers may be responsible for the use tax either as sellers or purchasers of property; typical examples of liability for use tax as purchasers are with respect to furniture, stationery, office supplies, advertising matter, and plant equipment bought for use here from out-of-State sellers who do not maintain places of business in California or who have not been authorized to collect the use tax from their purchasers.

# Retail Sales Tax Act

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*An act imposing a tax for the privilege of selling, renting, leasing, producing, fabricating, processing, printing or imprinting tangible personal property and for the privilege of furnishing, preparing or serving tangible personal property, providing for permits to sellers of tangible personal property, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof, and providing this act shall take effect immediately. [Statutes 1939, p. 2169; operative July 1, 1939.]*

**History.**—Enacted Stats. 1933, p. 2599. Stats. 1935, p. 1256, added the words “renting or leasing.” Stats. 1939, p. 2169, added the words “producing, fabricating, processing, printing or imprinting” and changed “retailer” to “seller of tangible personal property.”

(Approved July 31, 1933. Stats. 1933, p. 2599; amended by Stats. 1935, pp. 1225, 1252 and 1256; Stats. 1937, pp. 1326 and 2222, and by Stats. 1939, pp. 1224, 1890, 1906 and 2170; Stats. (First Extra Session) 1940, Chaps. 32, 46 and 50; Stats. 1941, Chaps. 247, 681 and 767.)

## SHORT TITLE

SECTION 1. This act is known and may be cited as the “Retail Sales Tax Act of 1933.” [Original section; Statutes 1933, p. 2599.]

## DEFINITIONS

SEC. 2. The following words, terms and phrases when used in this act have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) “**Person**” includes any individual, firm, copartnership, joint adventure, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, syndicate, this State, any county, city and county, municipality, district or other political subdivision thereof, or any other group or combination acting as a unit, and the plural as well as the singular number.

(b) “**Sale**” means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, or any withdrawal, except a withdrawal pursuant to a transaction in foreign or interstate commerce, of tangible personal property from the place at which such property is located for delivery to a point in this State for the purpose of the transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of such tangible personal property for a consideration, and includes the

producing, fabricating, processing, printing or imprinting of tangible personal property for consumers who furnish either directly or indirectly the materials used in such producing, fabricating, processing, printing or imprinting, the furnishing and distributing of tangible personal property for a consideration by social clubs and fraternal organizations to their members or others, and the furnishing, preparing or serving for a consideration of food, meals or drinks. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale. A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated or printed to the special order of the customer, or of any publication, shall likewise be deemed a sale.

(c) A **“retail sale”** or **“sale at retail”** means a sale to a consumer or to any person for any purpose other than for resale in the regular course of business in the form of tangible personal property, except that the expressions “transfer of possession,” “lease,” and “rental” as used in subdivision (b) of this section shall mean and include only such transactions as the board, upon investigation, finds to be in lieu of sales as defined in subdivision (b) of this section without the words “lease or rental.”

The delivery in this State of tangible personal property by an owner or former owner thereof or by a factor if such delivery is to a consumer pursuant to a retail sale made by a retailer not engaged in business in this State, is a retail sale in this State by the person making such delivery and such person shall include the retail selling price of such property in his gross receipts.

(d) **“Business”** includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

(e) **“Seller”** includes every person engaged in the business of selling tangible personal property the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed hereunder.

**“Retailer”** includes every person engaged in the business of making sales at retail or in the business of making retail sales at auction of tangible personal property owned by such person or others; except that public or private schools, school districts, student organizations and parent-teacher associations serving meals exclusively to students and teachers, and employers or employee organizations serving meals exclusively to employees shall not be regarded as retailers of the meals served by them. When in the opinion of the board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers the board may so regard them and may regard

the dealers, distributors, supervisors or employers as retailers for purposes of this act.

(f) "**Gross receipts**" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, except that in accordance with such rules and regulations as the board may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor must pay to the State, or has paid the use tax with respect to such property, and has resold the property prior to making any use of such property other than retention, demonstration, or display while holding it for sale in the regular course of business, and without any deduction on account of the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever; provided, however, that cash discounts allowed and taken on sales shall not be included, and "gross receipts" shall not include the sale price of property returned by customers upon rescission of the contract of sale, when the full sale price thereof is refunded either in cash or by credit, nor shall "gross receipts" include the price received for labor or services used in installing or applying the property sold.

For the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailers shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer.

(g) "**Board**" means the State Board of Equalization.

(h) "**Tangible personal property**" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.

(i) "**In this State**" or "**in the State**" means within the exterior limits of the State of California and includes all territory within such limits owned by or ceded to the United States of America. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2599. Stats. 1935, p. 1256, added provisions to (a) respecting state and political subdivisions; added provisions to (b) respecting transfer of possession, lease, rental and fabrication; added provisions to (c) defining "transfer of possession," "lease" and "rental"; added provisions to (e) respecting dealers, distributors, etc., as retailers; added provisions to (f) respecting lease or rental price; and added (h) and (i). Stats. 1937, p. 2223, added provisions to (e) respecting sales at auction. Stats. 1939, p. 2170, added to (a) the words "social club, fraternal organization"; added to (b) the references to withdrawals, to producing, processing, printing, or imprinting, to social clubs and fraternal organizations and to special orders, and revised provisions relating to the serving of food, meals, or drinks; added to (c) the words "in the regular course of business" and the entire second paragraph; added to (e) the first paragraph and the reference in the second paragraph to the serving of meals to students, teachers and employees; added to (f) the proviso relating to deduction on account of cost of property; added the words "upon rescission of the contract of sale" and omitted the words "remodeling" and "repairing." Stats. 1941, Chap. 247, added to (b) the words "or of any publication."



## TRANSFERS OF PUBLICATIONS

SEC. 2.5. Repealed. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. (First Extra Session) 1940, Chap. 46, providing that "sale" did not include the transfer of any publication by the publisher thereof or subsequent distributors thereof if such publication was regularly issued at average intervals not exceeding one month.

## LEVY OF TAX; TAX RATE

SEC. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of  $2\frac{1}{2}$  per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of 3 per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes. [*Statutes 1935, p. 1253; operative July 1, 1935.*]

History.—Enacted Stats. 1933, p. 2600. Stats. 1935, p. 1253, increased rate, effective July 1, 1935, to three per cent.

## CONTRACTS MADE PRIOR TO EFFECTIVE DATE OF ACT

SEC. 4. Repealed. [*Statutes 1939, p. 2172; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2600, providing, in the case of sales contracts made prior to the effective date of the act, for the addition to the sales price of the amount of tax imposed by this act.

## EXEMPTIONS

SEC. 5. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the following:

(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

(b) The gross receipts from the sales, furnishing, or service of gas, electricity, and water, when delivered to consumers through mains, lines, or pipes.

(c) The gross receipts from the sale of gold bullion or gold concentrates or gold precipitates by the producer or refiner thereof.

(d) The gross receipts from sales of tangible personal property used for the performance of a contract on public works executed prior to the effective date of this act.

(e) The gross receipts from the sale of food products for human consumption. "Food products" as used herein includes cereals and cereal products, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products other than candy and confectionery,

coffee and coffee substitutes, tea, cocoa and cocoa products other than candy and confectionery. "Food products" does not include spirituous, malt or vinous liquors, soft drinks, sodas or beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith, medicines, tonics, and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts, nor does "food products" include meals served on or off the premises of the retailer nor drinks or foods furnished, prepared or served for consumption at tables, chairs or counters or from trays, glasses, dishes or other tableware provided by the retailer.

(f) The gross receipts from sales made prior to July 1, 1939, to the United States or any agency or instrumentality thereof except a corporate agency or a corporate instrumentality. [*Statutes 1939, p. 2172; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2601. Stats. 1935, p. 1253, added (e). Stats. 1939, p. 2172, added to (e) the reference to medicines, tonics, etc., revised provision referring to meals, drinks, and foods, and added (f).

## EXEMPTION OF SALES TO THE UNITED STATES

SEC. 5.1. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of taxes levied, assessed or payable hereunder the gross receipts from the sale of any tangible personal property to the United States or any agency or instrumentality thereof except a corporate agency or a corporate instrumentality. [*Statutes 1939, p. 1890; in effect June 12, 1939.*]

History.—Added by Stats. 1939, p. 1890.

## EXEMPTION OF PUBLICATIONS

SEC. 5.2. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax, levied, assessed, or payable under this act, the gross receipts from the sale of tangible personal property which becomes an ingredient or component part of any publication regularly issued at average intervals not exceeding one month and the gross receipts from the sale of any such publication. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1941, Chap. 247.

## SALES TO UNITED STATES CONTRACTORS

SEC. 5.3. Notwithstanding any other provision of law the tax imposed under this act shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property. [*Statutes 1941, Chapter 681; in effect June 11, 1941.*]

History.—Enacted Stats. 1941, Chap. 681.

## EXEMPTION OF VESSELS

SEC. 5.7. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the gross receipt from sales by builders thereof of vessels of more than 1,000 tons burden. [*Statutes 1937, p. 1326; in effect August 27, 1937.*]

History.—Added by Stats. 1937, p. 1326.

## EXEMPTION OF AIRCRAFT SALES TO THE UNITED STATES

SEC. 5.13. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed, or payable under this act, the gross receipts from sales of aircraft and parts therefor made to the United States Government for purposes of National defense. [*Statutes 1939, p. 1224; in effect May 3, 1939.*]

History.—Added by Stats. 1939, p. 1224.

## EXEMPTION OF SILVER BULLION

SEC. 5.14. There are hereby specifically exempted from the provisions of this act, and from the computation of the amount of tax levied, assessed, or payable under this act, the gross receipts from the sales of silver bullion by the producer or refiner thereof. [*Statutes 1939, p. 1906; in effect June 12, 1939.*]

History.—Added by Stats. 1939, p. 1906.

## EXEMPTION OF LIVE STOCK AND POULTRY

SEC. 5.18. There are hereby specifically exempted from the computation of the amount of tax levied, assessed or payable under this act, the gross receipts from sales of live stock and poultry of a kind the products of which ordinarily constitute food for human consumption. [*Statutes (First Extra Session) 1940, Chapter 50; in effect June 4, 1940.*]

History.—Added by Stats. (First Extra Session) 1940, Chap. 50.

## EXEMPTION OF MOTOR VEHICLE FUEL

SEC. 6. There is hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act, the gross receipts received from sales or distributions of motor vehicle fuel in this State subject to the tax imposed thereon under the provisions of the "Motor Vehicle Fuel License Tax Act," and not subject to refund.

The tax by this act imposed upon those sales of motor vehicle fuel which are subject to tax and refund under the "Motor Vehicle Fuel License Act" shall be collected by the State Controller by way of deduction from refunds otherwise allowable under said act. The amount of such deductions, he shall transfer from the Motor Vehicle Fuel Fund to the Retail Sales Tax Fund.

This section is hereby declared to be separable and distinct from all other portions of this act, and shall not be deemed a consideration

or inducement for the enactment of the whole or any portion of this act. If this section be for any reason declared invalid, the remainder of this act shall remain in full force and effect and shall be as completely operative as though this section had not been included therein. [*Original section; Statutes 1933, p. 2601.*]

## **REFUNDS TO GOVERNMENTAL AGENCIES**

SEC. 7. Repealed. [*Statutes 1935, p. 1253; operative July 1, 1935.*]

**History.**—Enacted Stats. 1933, p. 2601, providing for refund to governmental agencies of tax paid upon sales to the governmental agencies of food stuffs used for free distribution to the poor and needy.

## **ADVERTISING BY RETAILERS CONCERNING ABSORPTION OF TAX**

SEC. 8. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [*Original section; Statutes 1933, p. 2602.*]

## **COLLECTION OF TAX BY RETAILER FROM CONSUMER**

SEC. 8½. The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. This section is hereby declared to be separable and distinct from all other portions of this act, and shall not be deemed a consideration or inducement for the enactment of the whole or any portion of this act. If this section be for any reason declared invalid, the remainder of this act shall remain in full force and effect and shall be as completely operative as though this section had not been included herein. [*Original section; Statutes 1933, p. 2602.*]

## **QUARTERLY GROSS RECEIPTS RETURN; PAYMENT OF TAX; REVENUE STAMPS**

SEC. 9. The tax levied hereunder shall be a direct obligation of the retailer and shall be due and payable quarterly on or before the fifteenth day of the month next succeeding each quarterly period, the first of such quarterly periods being the period commencing with August 1, 1933, and ending on the thirtieth day of September, 1933. Each seller shall on or before the fifteenth day of the month following the close of the first quarterly period as above defined, and on or before the fifteenth day of the month following each subsequent quarterly period of three months, make out a return for the preceding quarterly period in such form as may be prescribed by the board showing the gross receipts of the seller, the amount of the tax for the period covered by such return and such information as the board may deem necessary for the proper administration of this act. The seller shall deliver the return together with a remittance of the amount of



the tax due to the office of the board. The board, if it deems it necessary in order to insure the payment or facilitate the collection of the tax imposed by this act, may require returns and payment of the tax to be made for quarterly periods other than calendar quarters, depending upon the location of the principal place of business of the seller, or for other than quarterly periods. Returns shall be signed by the seller or his duly authorized agent but need not be verified by oath.

Gross receipts from rentals or leases of tangible personal property shall be reported and the tax paid with respect thereto in accordance with such rules and regulations as the board may prescribe.

The board, if it deems it necessary to insure the collection of the tax imposed by this act, may provide by rule and regulation for the collection of said tax by the affixing and canceling of revenue stamps and may prescribe the form and method of such affixing and canceling.

The board may by regulation provide that the amount collected by the retailer from the consumer, in reimbursement of taxes imposed by this act, shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sale. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

**History.**—Enacted Stats. 1933 p. 2602. Stats. 1935, p. 1258, omitted provisions authorizing the granting of an extension of time for the payment of tax on credit sales and added paragraph respecting reporting tax on receipts from leases and rentals. Stats. 1939, p. 2173, substituted "seller" for "retailer" in provisions relating to the filing of returns. Stats. 1941, Chap. 247, added provisions for returns for quarterly periods other than calendar quarters.

## **DELINQUENCY PENALTY; INTEREST**

SEC. 9½. Any person failing to pay any tax, except taxes determined by the board under the provisions of Sections 17 and 18 hereof, within the time required by this act shall pay in addition to the tax a penalty of 10 per cent of the amount thereof, plus interest at the rate of one-half of 1 per cent a month, or fraction thereof, from the date at which the tax became due and payable until the date of payment. [*Statutes 1935, p. 1258; operative July 1, 1935.*]

**History.**—Added by Stats. 1935, p. 1258.

## **EXTENSION OF TIME FOR FILING RETURNS**

SEC. 10. The board for good cause may extend for not to exceed one month the time for making any return or paying any tax required under the provisions of this act.

Any person to whom such extension is granted and who pays the tax within the period for which the extension is granted shall pay, in addition to the tax, interest at the rate of 6 per cent per annum from the date the tax would have been due without such extension to the date of payment. [*Statutes 1939, p. 2174; operative July 1, 1939.*]

**History.**—Enacted Stats. 1933, p. 2603. Stats. 1939, p. 2174, changed "30 days" to "one month"; added to first paragraph the words "or paying any tax" and added the entire second paragraph.

## **SECURITY FOR PAYMENT OF TAX**

SEC. 11. The board, whenever it deems it necessary to insure compliance with the provisions of this act, may require any person subject to the tax imposed hereunder to deposit with it such security as the

board may determine. The amount of the security shall be fixed by the board but shall not be greater than twice the person's estimated average tax for the period for which he files returns, determined in such manner as the board deems proper, or ten thousand dollars (\$10,000), whichever amount is the lesser. The amount of the security may be increased or decreased by the board subject to the limitations herein provided. The security may be sold by the board at public sale if it becomes necessary so to do in order to recover any tax, interest or penalty due. Notice of such sale may be served upon the person who deposited such securities personally or by mail; if by mail, service shall be made in the manner prescribed by Section 1013 of the Code of Civil Procedure and addressed to the person at his address as the same appears in the records of the board. Upon any such sale, the surplus, if any, above the amounts due under this act shall be returned to the person who deposited the security. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

**History.**—Enacted Stats. 1933, p. 2603. Stats. 1941, Chap. 247, added second and third sentences and reworded fourth sentence.

## PERMITS

SEC. 12. Thirty days after the effective date of this act, it shall be unlawful for any person to engage in or transact business as a seller within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. Any person who engages in business as a seller in this State without a permit or permits or after a permit has been suspended, and the officers of any corporation which shall so sell, shall be guilty of a misdemeanor. [*Statutes 1939, p. 2174; operative July 1, 1939.*]

**History.**—Enacted Stats. 1933, p. 2603. Stats. 1939, p. 2174, substituted "seller" for "retailer" and reworded last sentence.

## FEE FOR PERMIT

SEC. 13. At the time of making such application, the applicant shall pay to the board a permit fee of one dollar (\$1) for each permit, and the applicant must have a permit for each place of business. [*Original section; Statutes 1933, p. 2604.*]

## ISSUANCE AND DISPLAY OF PERMIT

SEC. 14. After compliance with the provisions of Sections 11, 12 and 13 hereof by the applicant, the board shall grant and issue to each applicant a permit for each place of business within the State. A per-

mit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued. [*Statutes 1939, p. 2175; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2604. Stats. 1939, p. 2175, reworded first sentence.

### RENEWAL OF PERMIT

SEC. 15. Permits issued under the provisions of this act prior to April 1, 1935, shall expire on July 31, 1935, and must be renewed through filing an application for renewal on forms prescribed by the board. For each such renewal a fee of one dollar (\$1) must be paid at the time of filing the application therefor. If any retailer shall fail to apply for renewal of his permit or permits as herein required prior to August 1, 1935, a fee of one dollar and fifty cents (\$1.50) must be paid for the renewal of each permit.

The board shall charge a fee of one dollar (\$1) for the renewal or issuance of a permit to a seller whose permit has been previously suspended or revoked. [*Statutes 1939, p. 2175; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2604, providing permits valid without further payment of fee until suspended or revoked by board. Stats. 1935, p. 1259, omitted these provisions and added provisions requiring renewal of permits. Stats. 1939, p. 2175, substituted "seller" for "retailer" in second paragraph.

### REVOCATION OF PERMIT

SEC. 16. Whenever any person has failed to comply with any of the provisions of this act or any rules or regulations of the board prescribed and adopted under this act, the board upon hearing, after giving to such person 10 days notice in writing specifying the time and place of such hearing and requiring him to show cause why his permit or permits should not be revoked, may revoke or suspend any one or more of the permits held by such person. Such notice may be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section 17 hereof. A new permit shall not be issued after the revocation of a permit unless it appears to the satisfaction of the board that the former holder of the permit will comply with such provisions and regulations. [*Statutes 1939, p. 2175; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2604. Stats. 1939, p. 2175, reworded first sentence and added last two sentences.

### PRESUMPTION THAT GROSS RECEIPTS ARE TAXABLE; ADDITIONAL ASSESSMENTS

SEC. 17. The burden of proving that a sale of tangible personal property is not a sale at retail shall be upon the person who makes it, unless such person takes from the purchaser a certificate to the effect that the property is purchased for resale. Such certificate relieves the seller from such burden only if taken in good faith from a person engaged in the business of selling tangible personal property and holding the permit provided for in Section 12 of this act and who, at the time of purchasing the tangible personal property, intends to



sell it in the regular course of business or is unable to ascertain at the time of purchase whether such property will be sold or will be used for some other purpose. Such certificate shall be signed by and bear the name and address of the purchaser, shall indicate the number of the permit issued to such purchaser under this act, and shall indicate the general character of the tangible personal property sold by such purchaser in the regular course of business. Such certificate shall be substantially in such form as the board may prescribe.

If a purchaser who gives such a certificate makes any use of such property other than retention, demonstration, or display while holding it for sale in the regular course of business, such use shall be deemed a retail sale by such purchaser as of the time such property is first used by him and the cost of such property to him shall be deemed the gross receipts from such retail sale. If the sole use of such property other than retention, demonstration or display in the regular course of business is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the rental charged rather than the cost of the property to him.

For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established.

If the board is not satisfied with the return or returns of tax made by any retailer, it is hereby authorized and empowered to make one or more additional assessments of tax due from such retailer based upon the facts contained in the return or returns, or upon any information within its possession or that shall come into its possession. One or more additional assessments may be made of the amount of tax due for one or for more than one period. The amount of tax so assessed shall bear interest at the rate of one-half of 1 per cent per month, or fraction thereof, from the fifteenth day after the close of the quarterly period for which the amount of such tax or any portion thereof should have been returned until the date of payment. In making an assessment hereunder the board may offset overpayments for a period or periods, together with interest on such overpayments, against underpayments for another period or periods, against penalties, and against the interest on such underpayments. Such interest on underpayments and overpayments shall be computed in the manner set forth in Sections 9½ and 23 hereof. If any part of the deficiency for which the additional assessment is imposed is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of 10 per cent of the amount of the additional assessment shall be added thereto. If any part of the deficiency for which the additional assessment is imposed is due to fraud or an intent to evade the tax, a penalty of 25 per cent of the amount of the additional assessment shall be added thereto. The board shall give to the retailer written notice of such additional assessment. Such notice may be served upon the retailer personally or by mail; if by mail, service shall be made in the manner prescribed by Section 1013 of the Code of Civil Procedure and addressed to the retailer at his address as the same appears

in the records of the board. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

**History.**—Enacted Stats. 1933, p. 2604. Stats. 1935, p. 1259, omitted requirement that notice of assessment state time and place for hearing on petition for reassessment, and added provisions respecting interest and penalties. Stats. 1937, p. 2224, clarified provisions respecting interest. Stats. 1939, p. 2175, reworded first sentence, added the first paragraph except the first sentence thereof, added the entire second paragraph, added "or returns" in third paragraph and added the third, fifth, and sixth sentences to the third paragraph and reworded fourth sentence of third paragraph. Stats. 1941, Chap. 247, reworded fourth paragraph for clarification.

## ASSESSMENT IF NO RETURN MADE

SEC. 18. If a retailer fails to make a return as required by this act, the board shall make an estimate based upon any information in its possession or that may come into its possession, of the amount of the gross receipts of the delinquent for the period or periods in respect to which he failed to make a return, and upon the basis of said estimated amount compute and assess the tax payable by the delinquent, adding to the sum thus arrived at a penalty equal to 10 per cent thereof. One or more assessments may be made of the amount of tax due for one or for more than one period. The amount of tax so assessed shall bear interest at the rate of one-half of 1 per cent per month, or fraction thereof, from the fifteenth day after the close of the quarterly period for which the amount of such tax or any portion thereof should have been returned until the date of payment. In making an assessment hereunder the board may offset overpayments for a period or periods together with interest on such overpayments against underpayments for another period or periods, against penalties, and against the interest on such underpayments. Such interest on underpayments and overpayments shall be computed in the manner set forth in Sections 9½ and 23 hereof.

If the failure of a retailer to file a return as required by this act was due to fraud or an intent to evade the tax, there shall be added to the tax a penalty equal to 25 per cent thereof in addition to the 10 per cent penalty for failure to file returns.

Promptly thereafter the board shall give to the delinquent written notice of such estimate, tax and penalty, the notice to be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section 17 hereof. But the delinquent shall have the right to petition for reassessment of any such tax found, determined and declared by the board pursuant to and in accordance with the provisions of this section. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

**History.**—Enacted Stats. 1933, p. 2605. Stats. 1935, p. 1260, omitted requirement that notice of assessment state time and place for hearing on petition for reassessment, and added provisions respecting interest and fraud penalty. Stats. 1939, p. 2177, added to first paragraph provisions specifically authorizing assessments of taxes due for more than one period and the offsetting of overpayments against underpayments, and reworded provisions relating to interest. Stats. 1941, Chap. 247, substituted "fails" for "neglects or refuses," substituted "failure" for "neglect or refusal," substituted "for failure to file returns" for "as above provided," and reworded second sentence for clarification.

## JEOPARDY ASSESSMENTS

SEC. 19. If the board believes that the collection of any tax or assessment imposed by or under this act will be jeopardized by delay, it shall thereupon make an assessment of such tax, noting that fact.

upon the assessment levied hereunder and the amount of such assessment shall be immediately due and payable. If the amount of the tax, interest and penalty specified in the jeopardy assessment is not paid within 10 days after the service upon the retailer of notice of the assessment, such assessment becomes final at the expiration of such 10 days, unless a petition for reassessment is filed within such 10 days, and the delinquency penalty and interest provided in Section 9½ hereof shall attach to the amount of the tax specified therein.

The retailer against whom a jeopardy assessment is levied hereunder may petition for the reassessment thereof pursuant to Section 20 hereof; provided, however, that such petition for reassessment must be filed with the board within 10 days after the service upon the retailer of notice of the assessment; and provided further, that the retailer must within said 10-day period deposit with the board such security as it may deem necessary to insure compliance with the provisions of this act. Such security may be sold by the board in the manner prescribed by Section 11 hereof. [*Statutes 1937, p. 2225; operative July 1, 1937.*]

History.—Enacted Stats. 1933, p. 2605, providing taxes assessed under Sections 17 and 18 due and payable fifteen days after service of notice of assessment of the tax. The original section was repealed and the jeopardy assessment provisions added by Stats. 1935, p. 1260. Stats. 1937, p. 2225, added provisions respecting finality of assessment and petition for reassessment.

## **PETITION FOR REASSESSMENT; HEARING; DUE DATE OF ASSESSMENTS; DELINQUENCY PENALTY**

SEC. 20. Any retailer against whom an assessment is made by the board under the provisions of Section 17 or 18 hereof or any person directly interested may petition for a reassessment thereof within 30 days after service upon the retailer of notice thereof. If a petition for reassessment is not filed within said 30-day period the amount of the assessment becomes final at the expiration thereof.

If a petition for reassessment is filed within said 30-day period the board shall reconsider the assessment, and if the retailer has so requested in his petition, shall grant said retailer an oral hearing and shall give the retailer 10 days' notice of the time and place thereof. The board shall have power to continue the hearing from time to time as may be necessary.

The board may decrease or increase the amount of the assessment. The amount of the assessment may be increased, however, only if a claim for such increase is asserted by the board at or before the hearing.

The order or decision of the board upon a petition for reassessment shall become final 30 days after service upon the retailer of notice thereof.

All assessments made by the board under the provisions of Section 17 or 18 hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of 10 per cent of the amount of the tax.

Any notice required by this section shall be served personally or by mail in the same manner as prescribed for service of notice



by the provisions of Section 17 hereof. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2605. Stats. 1935, p. 1260, added provisions respecting finality of assessment, notice of time and place of hearing on petition for reassessment, due date of assessment and penalty for delinquent payment of assessment. Stats. 1937, p. 2226, substituted 30 for 15 day period for finality of assessment and within which to petition for reassessment or pay the assessment and 30 for 60 day period for finality of assessment and within which to pay the assessment following the order of the board upon a petition for reassessment. Stats. 1939, p. 2177, added third paragraph. Stats. 1941, Chap. 247, added the words "or any person directly interested."

## **LIMITATION OF TIME FOR MAKING ADDITIONAL ASSESSMENTS**

SEC. 21. Except in case of fraud, intent to evade the tax, failure to make a return, or claim for additional tax pursuant to Section 20 hereof, and except in case of additional tax proposed to be assessed with respect to sales of property for the storage, use or other consumption of which notice of a determination of an additional amount has heretofore been given, or is hereafter given, pursuant to Sections 9, 10, 11 and 15 of the Use Tax Act of 1935, every notice of additional tax proposed to be assessed hereunder shall be mailed to the retailer within three years after the fifteenth day of the calendar month following the quarterly period for which the tax is proposed to be assessed or within three years after the return is filed, whichever period expires the later. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2606. Stats. 1935, p. 1261, extended limitation period from two to three years. Stats. 1939, p. 2178, added reference to claim for additional tax and changed provision relating to commencement of limitation period. Stats. (First Extra Session) 1940, Chap. 32, added the provisions relating to use tax determinations. Stats. 1941, Chap. 247, substituted "fraud, intent to evade the tax, failure" for "a fraudulent return or neglect or refusal."

## **INTEREST ON DELINQUENT TAXES**

SEC. 22. All taxes not paid to the board by the retailer on the date when the same become due and payable shall bear interest in the rate of one-half of 1 per cent per month, or fraction thereof, from and after such date until paid. [*Statutes 1935, p. 1261; operative July 1, 1935.*]

History.—Enacted Stats. 1933, p. 2606. Stats. 1935, p. 1261, changed rate of interest from 12 per cent per annum to one-half of 1 per cent per month, or fraction thereof.

## **OVERPAYMENTS; REFUNDS**

SEC. 23. If the board determines that any amount, penalty or interest has been paid more than once, or has been erroneously or illegally collected, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of what was legally due, and the person from whom it was collected, or by whom paid, and if approved by the State Board of Control the excess amount collected or paid shall be credited on any taxes then due from the retailer under this act or under the California Use Tax Act of 1935 and the balance shall be refunded to the person, or his successors, administrators, or executors. No refund shall be allowed unless a claim therefor is filed with the State Board of Equalization within three years from the fifteenth day after the close of the

quarterly period for which the overpayment was made or, with respect to assessments made under the provisions of Sections 17 and 18 hereof, within six months after such assessments became final, or within 60 days from the date of overpayment, whichever period expires the later. No credit shall be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the board within such period.

Every such claim must be in writing and must state the specific grounds upon which the claim is founded.

Failure to file such claim within the time prescribed in this section shall constitute waiver of any and all demands against this State on account of overpayments hereunder. Within 30 days after disallowing any such claim in whole or in part, the board shall serve notice of such action on the claimant, such service to be made as provided by Section 17 hereof.

Interest shall be computed, allowed and paid upon any overpayment of any tax, at the rate of one-half of 1 per centum per month as follows:

(1) From the fifteenth day of the calendar month following the quarterly period for which the overpayment was made but no refund or credit shall be made of any interest imposed upon the claimant with respect to the tax being refunded or credited.

(2) In the case of a refund, to the fifteenth day of the calendar month following the date upon which the claimant is notified by the board that a claim may be filed or that the claim has been certified to the State Board of Control, whichever date is the earlier.

(3) In the case of a credit, to the same date that interest is computed on the tax against which the credit is applied.

Any refund or any portion thereof which is erroneously made and any credit or any portion thereof which is erroneously allowed, may be recovered in an action brought by the Controller of the State in a court of competent jurisdiction in the County of Sacramento, in the name of the people of the State of California and such action shall be tried in the County of Sacramento unless the court with the consent of the Attorney General, orders a change of place of trial. The Attorney General must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for.

In the event that a tax has been illegally levied, the board shall certify such fact to the State Board of Control and said board shall authorize the cancellation of the tax upon the records of the board.

If the board determines that any overpayment of tax has been intentionally made or made by reason of carelessness, it shall not allow any interest thereon. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

**History.**—Enacted Stats. 1933, p. 2606. Stats. 1935, p. 1261, omitted provisions respecting filing of verified claims for refund in duplicate within six months from the date of overpayment. Stats. 1937, p. 2226, added provisions respecting filing of claim for refund within three years from the date of overpayment and provisions respecting interest on overpayments. Stats. 1939, p. 2178, revised first paragraph to authorize the application of overpayments against taxes due under the Use Tax Act, to compute the limitation period from the fifteenth day after the quarterly period instead of from the date of overpayment, and to extend the limitation period on refunds or credits with respect to assessments to six months after the assess-



ments become final; added third and last paragraphs and revised provisions relating to the computation and allowance of interest. Stats. 1941, Chap. 247, reworded the first paragraph to provide that refunds shall be to the "person" making the overpayment and to permit credits to be allowed prior to the expiration of the specified three-year period without the filing of a claim for credit, and added the words "or within 60 days from the date of overpayment."

## **FRAUD OR EVASION OF TAX**

SEC. 24. If fraud or evasion on the part of a retailer is discovered by the board, it shall determine the amount by which the State has been defrauded, shall add to the amount so determined a penalty equal to 25 per cent thereof, and shall assess the same against the retailer. All such assessments shall bear interest at the rate of one-half of 1 per cent per month or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which the amount should have been paid. The amount so assessed shall be immediately due and payable and if not paid within 10 days after the service upon the retailer of notice of the assessment the delinquency penalty and interest provided in Section 9½ hereof shall attach to the amount of the tax specified therein. [*Statutes 1935, p. 1262; operative July 1, 1935.*]

History.—Enacted Stats. 1933, p. 2606. Stats. 1935, p. 1262, added provision respecting interest and delinquency penalty.

## **REPORT OF BOARD TO CONTROLLER**

SEC. 25. The board shall report to the Controller the amount of collections under this act and he shall keep a record thereof. [*Statutes 1937, p. 2227; operative July 1, 1937.*]

History.—Enacted Stats. 1933, p. 2607. Stats. 1937, p. 2227, omitted provisions that board report all assessments and substituted therefor that board report amount of collections.

## **COLLECTION PROCEDURE; LIEN OF TAX**

SEC. 26. In any case in which any tax, interest or penalty imposed under this act is not paid when due the board may within three years after the tax is due file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount of the tax, interest and penalty due, the name and address as it appears on the records of the board of the retailer liable for the same, that the board has complied with all the provisions of this act in relation to the computation and levy of the tax and a request that judgment be entered against the retailer in the amount of the tax, interest and penalty set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people of the State of California against the retailer in the amount of the tax, interest and penalty set forth in the certificate. The judgment may be filed by the county clerk in a loose-leaf book entitled "Special Judgments for State Retail Sales or Use Tax."

An abstract of such judgment or a copy thereof may be recorded with the county recorder of any county and from the time of such recording, the amount of the taxes, interest and penalty therein set forth shall constitute a lien upon all the real property of the retailer in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and

priority of a judgment lien and shall continue for five years from the date of the judgment so entered by the county clerk unless sooner released or otherwise discharged. The lien may, within five years from the date of the judgment or within five years from the date of the last extension of the lien in the manner herein provided, be extended by filing for record in the office of the county recorder of any county an abstract or copy of the judgment and from the time of such filing the lien shall be extended to the real property in such county for five years unless sooner released or otherwise discharged. Execution shall issue upon such a judgment upon request of the board in the same manner as execution may issue upon other judgments and sales shall be held under such execution as prescribed in the Code of Civil Procedure. In all proceedings under this section the board shall be authorized to act on behalf of the people of the State of California.

In any case in which any tax, interest or penalty imposed under this act is not paid when due the board may within three years after the tax is due file in the office of any county recorder a certificate specifying the amount of the tax, interest and penalty due, the name and address as it appears on the records of the board of the retailer liable for the same, and that the board has complied with all provisions of this act in relation to the computation and levy of the tax. From the time of the filing for record the amount of the tax, interest and penalty therein set forth shall constitute a lien upon all real property of the retailer in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and priority of a judgment lien and shall continue for five years from the time of the filing of the certificate unless sooner released or otherwise discharged. The lien may, within five years from the date of the filing of the certificate or within five years from the date of the last extension of the lien in the manner herein provided, be extended by filing for record a new certificate in the office of the county recorder of any county and from the time of such filing the lien shall be extended to the real property in such county for five years unless sooner released or otherwise discharged.

At any time within three years after the delinquency of any tax, interest, or penalty, or within five years after the filing of the certificate referred to in the third paragraph of this section a warrant may be issued by the board or its duly authorized representative for the collection of any tax, interest or penalty and for the enforcement of any lien, directed to any sheriff, marshal or constable; and shall have the same effect as a writ of execution. It may and shall be levied and sale made pursuant to it in the same manner and with the same effect as a levy of and sale pursuant to a writ of execution. The sheriff, marshal or constable shall receive upon the completion of his services pursuant to a warrant and the board is authorized to pay to him the same fees and commissions and expenses in connection with services pursuant to said warrant as are provided by law for similar services pursuant to a writ of execution; provided, that fees for publication in a newspaper shall be subject to approval by the board rather than by the court; said fees, commissions and expenses shall be an obligation of the retailer and may be collected from the retailer

by virtue of the warrant or in any other manner provided in this act for the collection of a tax.

If any retailer liable for any tax, interest or penalty levied hereunder shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within 15 days after the date of selling or quitting business. His successor, successors or assigns, if any, shall withhold sufficient of the purchase price to cover the amount of such taxes, interest or penalties accrued or due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no taxes, interest or penalties are due. If the purchaser of a business or stock of goods shall fail to withhold the purchase price as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by any former owner, owners or assignors to the extent of the purchase price, valued in money. Within 30 days after receiving a written request from the purchaser for a certificate, the board shall either issue the certificate or mail notice to the purchaser at his address as it appears on the records of the board of the amount of the tax, interest, and penalties that must be paid as a condition of issuing the certificate. Failure of the board to mail the notice will release the purchaser from any further obligation to withhold purchase price as above provided.

In the event that any retailer is delinquent in the payment of the tax herein provided for or in the event an assessment has been made against him which remains unpaid, the board may, not later than three years after the payment becomes delinquent give notice thereof by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such retailer, or owing any debts to such retailer at the time of receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts until the board shall have consented to a transfer or disposition, or until 20 days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice, advise the board of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

At any time within three years after any retailer is delinquent in the payment of the tax herein provided for, the board may proceed forthwith to collect the tax due from the retailer in the following manner: The board shall seize any property, real or personal, of the retailer not exempt from execution under the provisions of the Code of Civil Procedure, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the tax due hereunder, together with any interest or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent retailer in writing at least 10 days before the date set for such sale by inclosing such notice in an envelope addressed to such retailer at his last known residence or place of business in this State, if any, and depositing the same



in the United States mail, postage prepaid, and by publication for at least 10 days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided, that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county 10 days prior to the date set for such sale. The said notice shall contain a description of the property to be sold, together with a statement of the amount of the taxes, interest, penalties and costs, the name of the retailer, and the further statement that unless such taxes, interest and penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

At any such sale, the property shall be sold by the board in accordance with law and said notice, and the board shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest the interest or title of the retailer in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer. If upon any such sale, the moneys so received shall exceed the amount of all taxes, interest, penalties and costs due the State from such retailer, any such excess shall be returned to the retailer, and his receipt therefor obtained; provided, however, that if any person having an interest or lien upon the property has filed with the board prior to any such sale notice of such interest or lien the board shall withhold any such excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If, for any reason, the receipt of such retailer shall not be available, the board shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such retailer, his heirs, successors or assigns.

It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act. [*Statutes 1939, p. 2179; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2607. Stats. 1935, p. 1262, omitted provisions authorizing filing of notice of lien for tax, interest or penalty due in recorder's office and substituted provisions authorizing entry of judgment for tax, interest or penalty due and the issue of execution thereon. Stats. 1939, p. 2179, inserted limitation period in first and sixth paragraphs and added third and fourth paragraphs. Stats. 1941, Chap. 247, substituted "address as it appears on the records of the board" for "last known address" in the first and third paragraphs, added provisions for the renewal of liens in the second and third paragraphs, substituted "the filing for record" for "such recording" in third paragraph, added all the words preceding "a warrant" to the fourth paragraph, added "marshal" and "marshal or constable" to fourth paragraph, clarified the provisions of fifth paragraph relating to the extent of the successor's liability, added the last two sentences to the fifth paragraph, reworded sixth paragraph to permit notice to be given "in the event an assessment has been made . . . which remains unpaid," and eliminated reference to a particular section of the Code of Civil Procedure in the seventh paragraph.

## RELEASE AND SUBORDINATION OF LIENS

SEC. 26.3. The board may at any time release all or any portion of the property subject to any lien provided for in this act from such

lien, or subordinate the lien to other liens and encumbrances, if it determines that the taxes, interest and penalties are sufficiently secured by a lien on other property or that the release or subordination of the lien will not endanger or jeopardize the collection of such taxes, interest and penalties. A certificate by the board to the effect that any property has been released from the lien provided for in this act or that such lien has been subordinated to other liens and encumbrances shall be conclusive evidence that the property has been released or that the lien has been subordinated as provided in the certificate. [*Statutes 1939, p. 2182; operative July 1, 1939.*]

History.—Added by Stats. 1939, p. 2182.

## PRIORITY OF TAX

SEC. 26½. Whenever any retailer or other person liable for any tax levied hereunder is insolvent, whenever any retailer or other person makes a voluntary assignment of his assets, whenever the estate of a deceased retailer or other person in the hands of executors, administrators, or heirs is insufficient to pay all the debts due from the deceased, or whenever the estate and effects of an absconding, concealed, or absent retailer or other person are levied upon by process of law, the tax, together with interest and penalties attaching thereto, shall be first satisfied; provided, however, that this section shall not be construed to give the State a preference over any recorded lien which attached prior to the date when the tax became a lien.

The preference given to the State by this section shall be subordinate to the preferences given to claims for personal services by Sections 1204 and 1206 of the Code of Civil Procedure. [*Statutes 1941, Chapter 767; in effect September 13, 1941.*]

History.—Added by Stats. 1935, p. 1225. Stats. 1939, p. 2183, added the words "or other person." Stats. 1941, Chap. 767, added the last paragraph.

## RECORDS OF SELLERS; ADMINISTRATION OF ACT BY BOARD

SEC. 27. Every seller shall keep such records, receipts, invoices and other pertinent papers in such form as the board may require.

The board or any person authorized in writing by it is hereby authorized to examine the books, papers, records and equipment and to investigate the character of the business of any person selling tangible personal property in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and assess the tax imposed by this act. The board is hereby charged with the enforcement of the provisions of this act and is hereby authorized and empowered to prescribe, adopt and enforce rules and regulations relating to the administration and enforcement of the provisions of this act in the collection of taxes, penalties and interest imposed by this act, and to that end may appoint such accountants, auditors, investigators and assistants as it may deem necessary to enforce its powers and perform its duties under this act and may designate representatives to conduct hearings, prescribe regulations or perform any other duties imposed by this act or other laws of this State upon the board.

The board may prescribe the extent, if any, to which any ruling or regulation relating to this act shall be applied without retroactive effect. [*Statutes 1939, p. 2183; operative July 1, 1939.*]

**History.**—Enacted Stats. 1933, p. 2609. Stats. 1935, p. 1264, substituted "person selling tangible personal property" for "retailer." Stats. 1937, p. 2227, added provisions respecting the designation of representatives to perform duties imposed upon the board and provisions respecting the retroactive effective rulings. Stats. 1939, p. 2183, substituted the word "seller" for "retailer" in the first paragraph.

## INFORMATION CONFIDENTIAL

SEC. 28. It shall be unlawful for the board, or any person having an administrative duty under this act to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any retailer or other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person; provided, however, that the Governor may, by general or special order, authorize examination of such returns by other State officers, by tax officers of another State or the Federal Government if a reciprocal arrangement exists, and any other persons the Governor may so authorize. Successors, receivers, trustees, executors, administrators, assignees, and guarantors, if directly interested, may be given information as to the items included in the measure and amounts of any unpaid tax, interest, and penalties.

Any violations of the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment not exceeding one year, or both, at the discretion of the court. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

**History.**—Enacted Stats. 1933, p. 2609. Stats. 1939, p. 2183, added in first paragraph the words "or other person," omitted the words "except as provided by law" at the end of the first clause and added to the second clause the words "by general or special order." Stats. 1941, Chap. 247, added the second sentence to the first paragraph.

## DISPOSITION OF PROCEEDS

SEC. 29. All fees, taxes, interest and penalties imposed under this act must be paid to the board in the form of remittances payable to the State Board of Equalization of the State of California, and said board shall transmit such payments to the State Treasurer to be deposited in the State Treasury to the credit of the "Retail Sales Tax Fund." For expenditure by the board in carrying out the provisions of this act for each fiscal year there is hereby appropriated out of the Retail Sales Tax Fund a sum of money which, together with any other appropriations for such purpose shall be equal to 3 per cent of all moneys deposited in said fund during the next preceding fiscal year. All moneys in the Retail Sales Tax Fund, unless otherwise appropriated shall, upon order of the State Controller, be drawn therefrom for the purpose of refunding to the retailers hereunder or be



transferred to the General Fund of the State. [*Statutes 1939, p. 2184; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2609. Stats. 1935, p. 1265, omitted specific appropriations for State Board of Equalization, Controller and State Treasurer, limited appropriation to State Board of Equalization of permit fees to fees paid to and including June 30, 1936, and provided tax remittances should be payable to State Board of Equalization rather than to State Treasurer. Stats. 1937, p. 2228, omitted appropriation of permit fees and added appropriation for the 89th and 90th fiscal years. Stats. 1939, p. 2184, omitted appropriation for 89th and 90th fiscal years and added appropriation for each fiscal year.

## SUIT TO ENFORCE PAYMENT

SEC. 30. At any time within three years after the delinquency of any tax, the board may bring an action in a court of competent jurisdiction in the name of the people of the State of California to collect the amount delinquent, together with interest and penalties. The Attorney General must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for. In such action a writ of attachment may issue, and no bond or affidavit previous to the issuing of said attachment is required. In such action a certificate by the board showing the delinquency shall be prima facie evidence of the levy of the tax, of the delinquency of the amount of tax, interest and penalty set forth therein and of compliance by the board with all provisions of this act, in relation to the computation and levy of the tax. [*Statutes 1939, p. 2184; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2610. Stats. 1935, p. 1265, extended limitation period from two to three years. Stats. 1939, p. 2184, added the words "interest and" in first sentence and added the words "of the amount of tax, interest, and penalty set forth therein" in last sentence.

## SUIT FOR REFUND

SEC. 31. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection under this act of any tax sought to be collected, and no suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed as provided in Section 23 hereof.

Within 90 days after the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board on the grounds set forth in such claim in a court of competent jurisdiction in the County of Sacramento for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed.

If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. Failure to bring suit or action

within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes due from the plaintiff under this act or under the California Use Tax Act of 1935, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of 6 per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than 30 days, such date to be determined by the board.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the board to recover any tax paid hereunder, when such action is brought by or in the name of an assignee of the retailer paying said tax, or by any person other than the person who has paid such tax. [*Statutes 1939, p. 2184; operative July 1, 1939.*]

**History.**—Enacted Stats. 1933, p. 2610. Stats. 1939, p. 2184, omitted provision for payment of tax under protest and substituted provision requiring filing of a claim for refund or credit prior to bringing suit, changed limitation period, added first sentence of third paragraph, revised fourth paragraph to authorize credits against taxes due under the Use Tax Act and to authorize allowance of interest upon the "amount" rather than the "tax" found to have been illegally collected, and provided for actions to be brought against the board rather than against treasurer.

## **PENALTY FOR FAILURE TO MAKE RETURN OR FOR MAKING FALSE OR FRAUDULENT RETURN**

SEC. 32. Any retailer failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the board, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars (\$500) for each such offense.

Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the assessment required by law to be made, shall be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars (\$300) and not more than five thousand dollars (\$5,000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court. [*Original section; Statutes 1933, p. 2611.*]

## **APPLICABILITY OF RES JUDICATA**

SEC. 32.5. In the determination of any case arising under this act, the rule of res judicata shall be applicable only if the liability involved is for the same quarterly period as was involved in another case previously determined. [*Statutes 1939, p. 2185; operative July 1, 1939.*]

**History.**—Added by Stats. 1939, p. 2185.

## PENALTY FOR VIOLATION OF ACT

SEC. 33. Any violation of the provisions of this act, except as otherwise herein provided, shall be a misdemeanor and punishable as such. [*Statutes 1937, p. 2228; operative July 1, 1937.*]

**History.**—Enacted Stats. 1933, p. 2611, providing for judicial review of orders of the board. Stats. 1935, p. 1265, added provisions requiring petitioner to pay cost of preparation of transcripts of board's proceedings. Stats. 1937, p. 2228, repealed the original section and renumbered section 32½ as section 33.

## CONSTITUTIONALITY

SEC. 34. If any section, subsection, clause, sentence or phrase of this act which is reasonably separable from the remaining portions of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portion of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional. [*Original section; Statutes 1933, p. 2611.*]

## ACT EFFECTIVE IMMEDIATELY

SEC. 35. This act, inasmuch as it provides for a tax levy for the usual current expenses of the State, shall, under the provisions of Section 1 of Article IV of the Constitution, take effect immediately. [*Original section; Statutes 1933, p. 2611.*]

# SUPPLEMENT

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*An act to add a new section, to be numbered 5.3, to the Retail Sales Tax Act of 1933 and a new section, to be numbered 6384, to the Revenue and Taxation Code, both relating to the taxable status of certain sales to contractors; to defer final assessment and determination of sales and use taxes in certain instances, to define certain terms relating to said taxes, to declare the legislative intent with respect thereto, and providing that this act shall take effect immediately. [Statutes 1941, Chapter 681, in effect June 11, 1941.]*

SECTION 1. A new section, to be numbered 5.3, is hereby added to the Retail Sales Tax Act of 1933, to read as follows:

Sec. 5.3. Notwithstanding any other provision of law the tax imposed under this act shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property.

SEC. 2. A new section, to be numbered 6384, is hereby added to the Revenue and Taxation Code.

6384. Notwithstanding any other provision of law the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property.

SEC. 3. Except as otherwise provided in this act, if a retailer, or other person authorized so to do, petitions in conformity with the requirements of Section 20 of the Retail Sales Tax Act of 1933, Section 12 of the Use Tax Act of 1935, or Section 6561 of the Revenue and Taxation Code for reassessment or redetermination of a tax computed on gross receipts from sales of, or the sales price of, tangible personal property purchased by contractors for use in the performance of contracts with the United States for construction of National Defense facilities on a cost-plus-a-fixed-fee basis, pending a final decision in a court of last resort that the tax imposed under the Retail Sales Tax Act of 1933, the Use Tax Act of 1935, or the Revenue and Taxation Code, as the case may be, is applicable with respect to transactions of such kind, the State Board of Equalization shall not initiate action to cause the assessment or determination to become final.



SEC. 4. Except as otherwise provided in this act, the State Board of Equalization shall not make a final assessment or determination with respect to a tax which is the subject of a petition for reassessment or redetermination under the conditions described in Section 3 hereof, and which is computed on gross receipts from, or the sales price of, a sale made prior to a decision such as is mentioned in said section or, if made subsequent to such a decision, at a price fixed by a contract which became binding prior to July 1, 1941, if it is established that the person liable for the tax has refrained from seeking reimbursement therefor only because of the insistence of those representing the United States with respect to such transactions and, after a reasonable effort to collect, can not be reimbursed therefor as a part of the sales or purchase price. As used in this section the term "reasonable effort to collect" shall not include nor require the institution of litigation until after such decision, and then only if it shall first have been established in a comparable matter, following a final assessment or determination made by the board pursuant to Section 6 of this act, that the person liable for the tax is entitled to be reimbursed for the amount thereof by his vendee.

SEC. 5. Unless a person otherwise liable for a tax such as is described in Section 3 of this act shall maintain accurate records with respect to all transactions of the type therein described and shall report the transactions to the State Board of Equalization as required by the Retail Sales Tax Act of 1933, the Use Tax Act of 1935, or the Revenue and Taxation Code, as the case may be, said section shall not apply to such person or to any tax assessed against him.

SEC. 6. Nothing contained in this act shall prevent the State Board of Equalization from making such final assessments or determinations of tax with respect to transactions of the type described in Section 3 of this act as it may deem necessary to establish the validity of assessments or determinations arising out of transactions of such kind, as well as to establish the right of the retailer or other person liable for the tax to be reimbursed for the amount thereof by his vendee, nor shall this act affect jeopardy assessments under Section 19 of the Retail Sales Tax Act of 1933, or jeopardy determinations under Section 11 of the Use Tax Act of 1935, or Section 6536 of the Revenue and Taxation Code.

SEC. 7. A taxpayer shall not be liable for interest with respect to any tax assessed or determined under the Retail Sales Tax Act of 1933 and Use Tax Act of 1935 or Revenue and Taxation Code, arising out of transactions described in Section 3 of this act, if such tax is paid within six months after the effective date of the final decision in a court of last resort that the tax imposed under said acts is applicable, as the case may be, with respect to transactions of such kind, or on or before the date on which the assessment or determination becomes final whichever is the later.

SEC. 8. Nothing contained in this act shall be construed as a legislative intent, interpretation, or concession to the effect that the

tax imposed under the Retail Sales Tax Act of 1933, the Use Tax Act of 1935, or Revenue and Taxation Code, as the case may be, is inapplicable with respect to any transaction or situation mentioned herein, and the Legislature hereby declares and reaffirms that the sales tax is not imposed upon any purchaser of tangible personal property in this State, but is for the privilege of engaging in the business of selling such property at retail. The Legislature hereby further declares that in enacting Section 5.1 of the Retail Sales Tax Act of 1933 and Section 6381 of the Revenue and Taxation Code, it did not intend to exempt from the sales tax the gross receipts from sales of tangible personal property used in the performance of contracts with the United States for the construction of improvements on or to real property.

SEC. 9. Notwithstanding any of the provisions of this act, the Retail Sales Tax Act of 1933, the Use Tax Act of 1935 or the Revenue and Taxation Code, a sale of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the United States for the construction of improvements on or to real property is hereby declared to be a retail sale within the meaning of that term as defined in said acts or said code, and, accordingly, the gross receipts from such a sale or the purchase price of property so sold shall be included in the measure of the tax imposed under said acts or said code, or any of them.

SEC. 10. If any section, subsection, clause, sentence or phrase of this act which is reasonably separable from the remaining portions of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portion of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional.

SEC. 11. This act, inasmuch as it provides for a tax levy for the usual current expenses of the State, shall, under the provisions of Section 1 of Article IV of the Constitution, take effect immediately; provided, however, that the provisions hereof adding Section 6384 to the Revenue and Taxation Code shall become operative at the same time as Part 1, Division 2, of the Revenue and Taxation Code, passed by the Legislature at its Fifty-fourth Session.